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In The

Supreme Court of the United States

October Term, 1961

No. 651

PAUL E. RHODES, PETITIONER,

V.

MAURICE SIGLER, RESPONDENT.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA

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INDEX

Subject Index

	Page
Opinion Below	1
Jurisdiction	2
Statute Involved	2
Question Presented for Review	2
Statement of the Case	3
Argument	5
Argument I	5
Argument II	9
Conclusion	11

Table of Cases

Commonwealth v. Gordon, 197 Ky. 367, 247 S. W. 45	8
Hart v. Best, 119 Colo. 569, 205 P. 2d 787	8
McFarland v. State, 172 Neb. 251, 109 N. W. 2d 397	7
Peff v. Doolittle, 235 Iowa 443, 15 N. W. 2d 913	8
Rhodes v. Sigler, 172 Neb. 439, 109 N. W. 2d 731	2, 4, 9
Spurrier v. Spurrier, 111 Okl. 242, 238 P. 956	8
State ex rel. Bressman v. Theisen, (Mo. App.) 142 S. W. 1088	8
State v. Callahan, 93 Kans. 172, 144 P. 189	8
Zimmerman v. Angele, 137 Colo. 129, 321 P. 2d 1105	8

Nebraska Statutes

Section 29-1004, Reissue Revised Statutes, 1943	2, 10

Page

Constitutional Provisions

Article I, Section 9 of the United States Constitution 4

Thirteenth Amendment to the United States Constitution 4

Texts

25 Am. Jur., Habeas Corpus, Sec. 108, p. 223 7

39 C. J. S., Habeas Corpus, Sec. 53, p. 596 7

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OPINION BELOW

The opinion of the Nebraska Supreme Court, here sought to be reviewed, is entitled Paul E. Rhodes, Ap-

pellant, v. Maurice Sigler, Appellee, is case No. 35092, and is reported in 172 Neb. 439, and 109 N. W. 2d 731. The opinion, except for the syllabus by the court, is printed in Appendix A to the brief of the petitioner herein, at page 23.

JURISDICTION

The respondent accepts, as substantially correct, the statement of the petitioner as to the grounds on which he seeks to invoke jurisdiction of this court.

STATUTE INVOLVED

Reissue Revised Statutes of Nebraska of 1943, Section 29-1001:

> "Whenever it shall be lawful and necessary to confine any prisoner in custody previous to conviction upon a criminal accusation, or in custody for contempt or alleged contempt of court, or upon an attachment by order of a court or judge, or otherwise in lawful custody, or upon conviction for any offense, the officer or person having him in such custody may convey him to and confine him in the jail of any county in this state or other secure and convenient place of confinement in this state, to be procured by such officer or person having such prisoner in custody."

QUESTION PRESENTED FOR REVIEW

Whether the denial of a writ of habeas corpus to the petitioner involved the decision of any federal question of substance, when petitioner was held in custody after lodging of error proceeding and upon his failure to post bail after suspension of execution of a sentence of imprisonment for contempt of court.

STATEMENT OF THE CASE

On November 21, 1960, the petitioner, Paul E. Rhodes, a lawyer, was found guilty of contempt of court by the District Court of Morrill County, Nebraska, and sentenced to be imprisoned in the Nebraska State Penitentiary for nine months, at hard labor, Sundays and holidays excepted, and to pay a fine of $2,500, and costs (R.9). Commitment was issued on November 25, 1960 (R.83). The petitioner perfected an error proceeding to the Supreme Court of Nebraska in the contempt action, and on December 23, 1960, the Supreme Court issued a writ of error, which suspended the execution of the sentence for contempt, and directed that the District Court of Morrill County admit the petitioner to bail (R.81). On January 23, 1961, the sheriff of Morrill County delivered the petitioner to the penitentiary (R. 82,84).

Petitioner did not request that the amount of bail be set, nor attempt to make bail, but, on January 26, 1961, the petitioner filed a petition for writ of habeas corpus in the District Court of Lancaster County, Nebraska (R.9). The allegations were that the petitioner was unlawfully imprisoned under a judgment and sentence of the District Court of Morrill County, Nebraska, for the reasons that the district court had no jurisdiction, power or authority, (a) to try the case in the absence of the defendant, (b) to enter judgment and pass sentence in the absence of the defendant, (c) to pronounce sentence of imprisonment in the Nebraska State Penitentiary for nine months, at hard labor, and fine of $2,500 and costs, for the offense of contempt of court, (d) to sentence to hard labor for such offense, (e) to try the case when the judge was disqualified to sit,

(f) to try the case after the court had been divested of jurisdiction by a habeas corpus action in the county court releasing defendant and discharging him from custody and from the charge of contempt, and (g) to try or to sentence the petitioner because he was "in custodia legis" during an appeal of another habeas corpus proceeding which freed him from imprisonment under another separate charge, and was therefore immune from prosecution for contempt.

The petition contained an allegation in paragraph 2 thereof that the court had no jurisdiction, power or authority to pronounce a sentence at hard labor for the reason that such a sentence violates the 13th Amendment to the Constitution of the United States. The petition further alleged, in paragraph 4 thereof, that the judgment of November 21, 1960, was an attempt to suspend or ignore the writ of habeas corpus, contrary to Article I, Section 9 of the Constitution of the United States, and was "an attempt to deprive the relator of his civil rights guaranteed by said Constitutions." These were the only allegations of violation of constitutional rights, privileges or immunities.

The District Court of Lancaster County, Nebraska denied the writ of habeas corpus on the same day of its filing (R.85), holding that jurisdiction in the error proceeding had lodged in the Supreme Court, and that the district court was without authority to interfere with that jurisdiction by habeas corpus. The petitioner appealed to the Supreme Court from this judgment of the district court denying the writ, and the Supreme Court affirmed the holding of the district court, in an opinion reported in 172 Neb. 439, 109 N. W. 2d 731. The opinion, except for the syllabus by the court, is

reproduced at Appendix A of the brief of the petitioner in this action, page 23.

The Supreme Court of Nebraska held that jurisdiction in the contempt case had been lodged in the Supreme Court by error proceedings; that the district court therefore had no jurisdiction to interfere with the previous jurisdiction by habeas corpus; that the writ of habeas corpus was not to be used for the correction of errors. The Supreme Court further found that it had suspended the execution of the sentence for contempt, but that that order did not suspend liability to custody save and until the petitioner was admitted to bail; that petitioner apparently had elected not to ask to be admitted to bail; that the custody of the petitioner was not for the purpose of serving the sentence imposed, but was within the statutory authority of the sheriff, pending determination of the error proceedings in the contempt case.

Motion for re-hearing was overruled, and the petitioner now applies to this court for writ of certiorari.

ARGUMENT

I.

The District Court of Lancaster County Had No Jurisdiction or Authority to Interfere by Habeas Corpus with the Jurisdiction of the Supreme Court Previously Acquired in Error Proceeding.

By his application for writ of habeas corpus made to the District Court of Lancaster County, Nebraska, the petitioner sought to be released from the custody of the Warden of the State Penitentiary where he had been placed by the sheriff of Morrill County, Nebraska, fol-

lowing judgment and sentence for contempt and commitment issued thereon from the District Court of Morrill County. Petitioner had lodged an error proceeding in the contempt action with the Supreme Court of Nebraska, and writ of error had been issued, suspending the execution of the sentence and directing that the petitioner be admitted to bail.

At the time of the application for writ of habeas corpus the petitioner had made no application for bail to the District Court of Morrill County, apparently electing, instead, to suffer custody and seek the writ of habeas corpus.

The District Court of Lancaster County and the Supreme Court of Nebraska each held that jurisdiction to determine the issues raised by the petition for habeas corpus had been previously lodged in the Nebraska Supreme Court in the error proceeding there pending, and which had been initiated by the petitioner himself, and that the district court was therefore without authority to interfere with that jurisdiction by writ of habeas corpus.

In reaching that decision, it was not necessary to decide the merits of the allegations of the petition for writ of habeas corpus relating to claimed errors in the court proceeding for contempt. Petitioner had already obtained a suspension of the execution of the sentence, conditioned upon the posting of bail. The claim of illegal restraint in the petition for writ of habeas corpus is based on allegations of illegality in the proceedings and sentence of the court. The matters sought to be brought before the district court were matters already before the Supreme Court in the error proceeding instituted by the petitioner himself.

The rule which was applied by both the District Court of Lancaster County and the Nebraska Supreme Court in denying the writ of habeas corpus is stated in 39 C. J. S., Habeas Corpus, Sec. 53, p. 596, as follows:

> "Pursuant to a general rule of wide application, on which there is no conflict of authorities, it has been held that a court is without jurisdiction where it attempts by habeas corpus to interfere with the exercise by another court of jurisdiction theretofore acquired, whether such jurisdiction is acquired in another habeas corpus proceeding or on appeal, or otherwise, unless the prior jurisdiction has been terminated. * * *
>
> "* * * * * *."

Virtually the same rule is stated in 25 Am. Jur., Habeas Corpus, Sec. 108, p. 223.

Previous to its decision in the instant case, the Nebraska Supreme Court had applied this general rule in the case of *McFarland* v. *State*, 172 Neb. 251, 109 N. W. 2d 397, and reference is made to the *McFarland* case and the rules therein stated in the reported opinion of this case, 172 Neb. 439, 441, and as shown in the appendix to the brief of the petitioner herein at page 24. The *McFarland* case is the companion case to the contempt action here involved, and was an action for contempt against the county judge who had collaborated with this petitioner in issuing the writ of habeas corpus which petitioner refers to in paragraph 4 of his petition for writ of habeas corpus to the Lancaster County District Court (R.9). In affirming the conviction of the county judge, the Nebraska Supreme Court held that the writ of habeas corpus was void and that the proceedings attempted thereunder were void.

In so holding, the Nebraska Supreme Court quoted and approved *Peff* v. *Doolittle*, 235 Iowa 443, 15 N. W. 2d 913, as follows:

"* * * * *

"* * *. As valuable and important a right as is the writ of habeas corpus, and as essential as it is in guarding and preserving human liberty, yet, like any other order or judgment of a court, it can be granted only by a court having jurisdiction. Nor can the exercise of this power to grant the writ be used to unsettle valid legal proceedings or to interfere with the exercise of the jurisdiction of other courts.

"* * * * *."

The court also quoted and approved a Missouri case, *State ex rel. Bressman* v. *Theisen*, (Mo. App.) 142 S. W. 1088, as follows:

"Where one court has competent jurisdiction of the person and is proceeding to exercise it, it would be a great outrage upon the administration of justice if a court of equal or inferior jurisdiction should by virtue of the writ of habeas corpus seek to override the jurisdiction of the former, by discharging the person and thus annulling its writs and processes and rendering abortive any judgment it might lawfully render."

The Nebraska court also pointed out cases to the same effect, i. e., *Hart* v. *Best*, 119 Colo. 569, 205 P. 2d 787; *Zimmerman* v. *Angele*, 137 Colo. 129, 321 P. 2d 1105; *Commonwealth* v. *Gordon*, 197 Ky. 367, 247 S. W. 45; *Spurrier* v. *Spurrier*, 111 Okl. 242, 238 P. 956; *State* v. *Callahan*, 93 Kan. 172, 144 P. 189.

We think it is clear that once the petitioner himself had chosen the forum for determination of the legality

of the proceedings in the contempt action by lodging a proceeding in error in the Supreme Court, he could not, under the rules just stated, interfere with that jurisdiction by an action in habeas corpus.

II.

The Custody of the Petitioner Was Not for the Purpose of Serving the Sentence Under the Contempt Proceeding.

The allegations of the petition for writ of habeas corpus go no further than to allege illegal restraint under a warrant of commitment issued on the judgment and sentence of the district court, which was claimed to be void for the several reasons set out in the petition. It was the petitioner's position in the Supreme Court of Nebraska, as it is here, that he was serving the sentence imposed upon him. This is apparently based, so far as the record is concerned, upon the return of the sheriff on the commitment issued previous to the lodging of error proceedings, and the receipt of the warden of the penitentiary, showing receipt of petitioner. Petitioner attempts to inject argument as to how he was thereafter treated, to show that he was serving the sentence, but none of these matters, whether true or not, appear anywhere in the record.

The Nebraska Supreme Court, recognizing in its opinion (*Rhodes* v. *Sigler*, Supra) that the petitioner contended the order of commitment was unauthorized and that he was being held under a sentence of the trial court which had been suspended by that court, held as follows:

"* * * * *

"We need not determine here whether the issu-

ance of the order of commitment on November 25, 1960, was regular or irregular. As to that the rule is: If the proceedings subsequent to conviction are erroneous, such errors can be reviewed and corrected by proceedings in error in the regular course of the law, but not by the writ of habeas corpus. In re Application of Cole, 103 Neb. 802, 174 N. W. 509.

"We think it clear that from the 21st of November 1960, when the contempt judgment was rendered, the relator was subject to be taken into custody and held pending further orders of the court. Our order suspending the sentence did not suspend liability to that custody save and until the relator was admitted to bail. Relator is now being held in custody pending the determination of error proceedings from Morrill County. He is not being held as one serving the sentence imposed in that action.

"It appears from this showing that the sheriff had full authority under the provisions of section 29-1001, R. R. S. 1943, to hold relator in a 'secure and convenient place of confinement.' If there is error in the determination it is a matter to be corrected in an error proceeding and not in habeas corpus. It has long been the rule that: The writ of habeas corpus is not a writ for the correction of errors, and will not be allowed to be used for that purpose. In re Application of Cole, *supra*.

"* * * * *"

The court was there telling the petitioner that his assumption that he was serving the sentence imposed by the trial court was in error, and was explaining the basis under which he was held, as well as pointing out the statutory basis for such custody. Section 29-1001, R. R. S. Nebr. 1943, is set out in full in a previous portion of this brief.

CONCLUSION

Jurisdiction in the contempt proceeding against the petitioner had been lodged in the Nebraska Supreme Court by error proceeding instituted by the petitioner himself. The District Court of Lancaster County, Nebraska, had no jurisdiction to interfere with that previous jurisdiction by habeas corpus action. It was not necessary to determine any of the claimed violations of constitutional rights, privileges and immunities, because of that previous jurisdiction, and because the custody of the petitioner was not custody for the purpose of serving the sentence under the contempt proceeding, but was custody to which he was subject pending the determination of the error proceeding, unless he should post bail.

The respondent respectfully suggests that the denial of the writ of habeas corpus to this petitioner did not involve the decision of any federal question and should not be reviewed by this court.

Respectfully submitted,

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March, 1962.